No. 14-449, 14-450, 14-452

IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner*,

*vs.*

JONATHAN D. CARR,
REGINALD DEXTER CARR, JR., and,
SIDNEY J. GLEASON,

*Respondents*.

**On Writ of Certiorari to the Supreme Court of Kansas**

## BRIEF *AMICUS CURIAE* OF CRIMINAL JUSTICE LEGAL FOUNDATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

2. Whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event?

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## BRIEF *AMICUS CURIAE* OF CRIMINAL JUSTICE LEGAL FOUNDATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to

1. All parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors; assistant prosecutors; investigators; victim witness advocates; and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutors' views as *amicus curiae* in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

In these cases, the Kansas Supreme Court has invented a new constitutional requirement never before imposed in any other state in over 40 years of litigation over capital sentencing procedure in the post-*Furman* era. Invention of such novel constitutional mandates disapproving standard practices often wipes out large numbers of just, deserved sentences imposed for

horrible crimes in accordance with the law in effect at the time of trial. Such arbitrary mass reversals are contrary to the interests of *amici*.

## SUMMARY OF FACTS AND CASE

The crimes committed by brothers Jonathan and Reginald Carr are exceptionally horrible and depraved even by the standards of capital cases. These are the kinds of crimes that cause people to say that if we are going to have the death penalty at all, these are definitely the kinds of crimes that deserve it. Anything less would be a grotesque miscarriage of justice.

The Carr brothers' crime spree in December 2000 in Wichita, Kansas, began with the robbery, kidnapping, and aggravated battery of Andrew Schreiber. See *State* v. *Carr* (*Reginald*), 300 Kan. 1, 15-20, 331 P. 3d 544, 573-576 (2014). Next they attempted to rob Linda Walenta, a cellist with the Wichita Symphony, in her car in her own driveway. When she attempted to escape, the robber shot her three times. She was rendered paraplegic but was able to describe the crime. She died of complications three weeks after the crime. See *id.*, at 20-22, 331 P. 3d, at 576-577.

Finally, they forced their way into the home of Aaron S., Brad H., and Jason B. Holly G. and Heather M. were also in the home at the time. Not content with a home invasion robbery, they engaged in a sadistic and depraved course of forcing the victims to perform sex acts on each other for the Carr brothers' amusement, and then both committed their own sexual assaults. See *id.*, at 22-27, 331 P. 3d, at 577-580. Then they took all five victims out to a soccer field and shot them. See *id.*, at 28-29, 331 P. 3d, at 580-581. Holly G. was wounded but survived, the bullet miraculously deflected by a plastic hair clip. See *id.*, at 30, 331 P. 3d, at 581.

The other four died. "All of the gunshot wounds to the four Birchwood murder victims were consistent with their bodies being in a kneeling position with their heads down when the bullets entered their skulls." *Id.*, at 38, 331 P. 3d, at 586. DNA evidence establishes the identity of the perpetrators. See *id.*, at 39, 331 P. 3d, at 586.

In both cases, the Kansas Supreme Court affirmed the convictions in part and reversed in part and vacated the death sentences. See *id.*, at 17, 254-258, 331 P. 3d, at 574, 706-708; *State* v. *Carr* (*Jonathan*), 300 Kan. 340, 355, 367-371, 329 P. 3d 1195, 1205, 1212-1214 (2014). The affirmed convictions included one count of capital murder of Heather M., Aaron S., Brad H., and Jason B.

The reversal of the sentences was based in part on the holding of *State* v. *Gleason*, 299 Kan. 1127, 329 P. 3d 1102 (2014), that the judge must specifically instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. Justice Biles, dissenting on this point, noted that "the majority's conclusion defies the United States Supreme Court's established Eighth Amendment jurisprudence and lacks any persuasive analysis articulating why the circumstances in this case justify a departure from that precedent." *Reginald Carr*, 300 Kan., at 327, 331 P. 3d, at 746. This Court granted certiorari in both cases on that issue and a severance issue on March 30, 2015, and consolidated the cases. On the same date, this Court granted certiorari in the *Gleason* case.

> "On February 12, 2004, Gleason, Damien Thompson, Ricky Galindo, Brittany Fulton, and Mikiala "Miki" Martinez robbed Paul Elliott at knifepoint at his home in Great Bend. Sometime thereafter, Gleason and Thompson learned police had interviewed Fulton and Martinez about the robbery. Nine days after the robbery, Gleason and

> Thompson drove from Lyons to Great Bend where Gleason shot and killed Martinez' boyfriend, Darren Wornkey, wounding Martinez in the process. Thompson and Gleason then kidnapped Martinez and took her to a rural location where Thompson strangled, shot, and killed her. Gleason and Thompson left Martinez' body near the road and returned to Lyons. Later that evening, Gleason and Thompson returned to the scene of Martinez' murder, placed Martinez' body near a tree further from the road, and covered her body with small branches." *State* v. *Gleason*, 299 Kan. 1127, 1134, 329 P. 3d 1102, 1113-1114 (2014).

Gleason committed these crimes less than a month after his release on parole for a prior attempted homicide. See *id.*, at 1146, 329 P. 3d, at 1120.

The Kansas Supreme Court affirmed the convictions except for vacating a second murder count for one victim as "multiplicitous." See *id.*, at 1184-1185, 329 P 3d, at 1141. However, the court held that because juries are instructed that aggravating circumstances must be proved beyond a reasonable doubt, the Eighth Amendment to the Constitution of the United States requires that the jury be expressly informed that mitigating circumstances need not be proved to that standard. See *id.*, at 1195-1197, 329 P 3d, at 1146-1148.

## SUMMARY OF ARGUMENT

Use of the Eighth Amendment to regulate details of capital sentencing procedure is an unwise practice that this Court largely discontinued many years ago. The primary purpose of procedural reform after *Furman* v. *Georgia* was to reduce arbitrariness, but "tinkering" does just the opposite. When novel constitutional

requirements are fabricated to strike down standard practices, broad swaths of judgments are overturned with little or no regard to whether those sentences were deserved. This is the height of arbitrariness.

*Boyde* v. *California* appropriately adopted a "reasonable likelihood" test for arguably ambiguous jury instructions to replace the looser test used in *Mills* v. *Maryland*. In deciding what is a reasonably likely interpretation, jurors should be given credit for a basic sense of justice. Given one interpretation that allows them to reach the result they believe to be just and another that forces them to sign their names to a verdict they believe to be wrong and unjust, they should be presumed to adopt the interpretation that leads to a just result. *Mills* was wrongly decided on its facts and should be expressly overruled.

## ARGUMENT

### I. "Tinkering" of the kind seen in this case is a cause of arbitrariness in the death penalty, not a cure for it.

The decisions of the Kansas Supreme Court in these cases read like a throwback to a bygone era, a time when this Court's "annually improvised Eighth Amendment, 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), made compliance with shifting dictates nearly impossible. Creative invalidation of established practices, finding constitutional violations where none had been seen for years, is not a cure for the arbitrariness that is supposedly the basis for the entire structure of procedural restrictions on capital punishment. See *Furman* v. *Georgia*, 408 U. S. 238,

309-310 (1972) (Stewart, J., concurring). It is a cause of arbitrariness.

Justice is served when the defendant gets what he deserves. In sentencing in a capital case, that means that those who deserve the death penalty should receive that sentence, and it should be carried out, and those who do not should receive a lesser sentence. The essence of *Furman* is to make that determination of just deserts a more rational and evenhanded process than it was under the unlimited, unguided discretion system that was upheld the year before in *McGautha* v. *California*, 402 U.S. 183, 207 (1971). Yet far too often the rules crafted in the 1980s and the early 1990s have operated to do just the opposite.

A new constitutional precedent on sentencing procedure striking down an established practice causes a huge disruption. All of the cases coming within a certain time window[2] are vacated unless they qualify for harmless error, and the stringent harmless error test in constitutional cases means that few will.[3]

Maryland, for example, was particularly hard hit with new Eighth Amendment rules of dubious legitimacy. The state's pioneering victim impact evidence law was struck down in the wrongly decided case of *Booth* v. *Maryland*, 482 U. S. 496 (1987), overruled in *Payne* v. *Tennessee*, 501 U. S. 808, 828-830

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2. The window may be defined by the date the practice was established, the date of the decision striking it down, and the retroactivity of that decision.

3. *Chapman* v. *California*, 386 U. S. 18, 24 (1967), should be reconsidered at some point in light of the fact that rules deemed constitutional are often not essential to a fair trial. This is particularly true with Eighth Amendment "death is different" sentencing procedure rules.

(1991). The state's standard method of instructing juries was struck down by a narrow majority in *Mills* v. *Maryland*, 486 U. S. 367 (1988), based on a far-fetched theory of possible misinterpretation by jurors. *Mills* used a standard we now know was incorrect. See *Boyde* v. *California*, 494 U. S. 370, 380 (1990). *Mills* was, *amici* submit, wrongly decided on its facts, see *infra* at 14, n. 5, but whether right or wrong *Mills* wiped out sentences in a wide swath of cases with little or no regard for how richly deserved those sentences were.

The arbitrariness of this disruption can be clearly seen in the case of Anthony Grandison. He was a criminal so dangerous that he arranged the murder of witnesses to an earlier crime while in federal custody awaiting trial. Yet his thoroughly deserved sentence was overturned due to *Mills*. See *Grandison* v. *State*, 341 Md. 175, 194, 670 A. 2d 398, 407 (1996). Resentencing and further review took so long that he was still on death row when the Maryland Legislature threw up its hands and gave up on ever having an effective death penalty in the state.[4] A killer who should have been executed decades ago escaped full justice arbitrarily because of the *Mills* case's dubious new rule. It was the reversal, not the imposition, of Grandison's sentence that was "the height of arbitrariness." Cf. *Mills*, 486 U. S., at 374.

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4. The fact that repeal was based on frustration rather than rejection of the death penalty as such is conclusively demonstrated by the fact that the repeal was not retroactive. Grandison's sentence and those of the other remaining death row inmates were commuted by the governor. See Wagner, Gov. O'Malley Commutes Sentences of Death Row Inmates, Washington Post, Dec. 31, 2014, http://www.washingtonpost.com/local/md-politics/gov-omalley-commutes-sentences-of-marylands-remaining-death-row-inmates/2014/12/31/044b553a-90ff-11e4-a412-4b735edc7175_story.html (all Internet materials as visited June 8, 2015).

Similar arbitrary injustice occurred in Florida, after *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), applied *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion) to overturn sentences rendered in accordance with a law reviewed and upheld in *Proffitt* v. *Florida*, 428 U. S. 242, 248-249, 258 (1976) (lead opinion). *Proffitt* was quite clear that it was reviewing a law with a specified list of mitigating circumstances. See *id.*, at 250 (modifying quote of statute to insert "statutory" before "mitigating"). Even though the lead opinion noted in a footnote that nonstatutory mitigating factors might also be considered, see *id.*, at 250, n. 8, there is no hint that instructing the jury on such consideration was constitutionally required.

Among the undeserving beneficiaries of *Lockett/Hitchcock* was Thomas Knight. In *Knight* v. *Florida*, 528 U. S. 990, 994 (1999), Justice Breyer, dissenting from denial of certiorari, said the long delay in his execution was not his fault because, among other reasons, his initial sentencing was "constitutionally defective." But it was not. His penalty trial was conducted correctly under the law in effect at the time and upheld in *Proffitt* while Knight's case was on direct appeal. See *Knight* v. *State*, 338 So. 2d 201 (Fla. 1976) (decided after *Proffitt*). His well-deserved first sentence was overturned, see *Knight* v. *Dugger*, 863 F. 2d 705, 710 (CA11 1988), because the Eighth Amendment had magically sprouted a new branch without a shred of basis in its text or history, see *Callins* v. *Collins*, 510 U. S. 1141, 1142 (1994) (Scalia, J., concurring in denial of cert.), contradicting the Court's opinions of only a few years earlier requiring restraint on sentencer discretion in order to reduce arbitrariness. See *Lockett* v. *Ohio*, 438 U. S. 586, 623 (1978) (White, J., dissenting in part); *Walton* v. *Arizona*, 497 U. S. 639, 661-667 (1990) (Scalia, J., concurring) (overruled on other grounds in *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002)).

This exceptionally violent multiple murderer, who murdered another person while review of his first case was pending, see *Knight* v. *State*, 721 So. 2d 287, 290 (Fla. 1998), was allowed to live out much of his natural life span and was not executed until 2014, when he should have been executed in the early 1980s. See Associated Press, Fla. Man Executed, Killed Couple, Prison Guard, Jan. 8, 2014, http://www.cbsnews.com/news/fla-man-executed-killed-couple-prison-guard/.

In 1994, dissenting from denial of certiorari in *Callins* v. *Collins*, 510 U. S., at 1145, Justice Blackmun notoriously declared, "I no longer shall tinker with the machinery of death." Those of us who had long fought against the tinkering responded, "Good! By all means stop tinkering!" See also *id.*, at 1142 (Scalia, J., concurring). And the Court did largely stop making up new "death is different" rules of sentencing procedure from that point.

From the mid-1990s onward, this Court made only one sweeping change in capital sentencing procedure. That was *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002), which was an application of a rule developed in a noncapital case under the Sixth Amendment rather than an Eighth Amendment "death is different" rule. The new Eighth Amendment rules have been largely substantive, giving certain small categories of capital defendants "trump cards" that exempt them from capital punishment regardless of how severe the aggravating circumstances of the individual case. See *Roper* v. *Simmons*, 543 U. S. 551, 578 (2005) (under 18); *Kennedy* v. *Louisiana*, 554 U. S. 407, 412-413 (2008) (nonfatal rape of child); *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002) (intellectual disability, then called mental retardation). These substantive rules cause far less disruption and therefore less arbitrariness than the new procedural rules because, by definition, they only

apply to discrete subsets of defendants who are rarely sentenced to death anyway. In California, for example, there were over 600 prisoners on death row at the time *Atkins* was decided, U. S. Bureau of Justice Statistics, Capital Punishment 2002, Table 4 (2003), but the California Attorney General informs *amici* that there have been only eleven successful *Atkins* postconviction review petitions.

The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), and the "deference" standard of the Antiterrorism and Effective Death Penalty Act of 1996 eventually dampened the tinkering by the lower federal courts, although not without considerable resistance. See, *e.g.*, *Beard* v. *Banks*, 542 U. S. 406, 408-409 (2004) (dubious extension of *Mills* reversed on *Teague* grounds). That still leaves state courts as possible sources of arbitrariness-inducing tinkering, however. If those courts fabricate novel reasons for overturning capital judgments based on state law, the remedies must be found within the state. If the state court invokes the United States Constitution for its tinkering, however, review by this Court is the only remedy.

## II. Where an instruction has more than one possible interpretation, the jury should be presumed to apply it in accordance with common sense and a just result.

In cases involving capital penalty phase jury instructions with more than one possible interpretation, there seem to be two sets of opinions. One set gives the jury credit for common sense and for working together to reach a just and sensible result. *Boyde* v. *California*, 494 U. S. 370, 380-381 (1990), typifies this approach.

> "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in

> the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting."

Other cases along similar lines include *Sochor* v. *Florida*, 504 U. S. 527, 538 (1992), *Brown* v. *Payton*, 544 U. S. 133, 147 (2005), and *Ayers* v. *Belmontes*, 549 U. S. 7, 21-22 (2006). The other set of opinions seems to be looking for any excuse to overturn a capital sentence. These include *Mills* v. *Maryland*, 486 U. S. 367 (1988), the opinions of the Kansas Supreme Court in the present cases, and the Ninth Circuit opinions reversed in *Payton* and *Belmontes*.

*Mills* accepted and *Sochor* rejected an argument based on *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931). See *Mills*, 486 U. S., at 376-377; *Sochor*, 504 U. S., at 538. The *Stromberg* theory is that if a jury is presented with two possibilities, one valid and the other invalid, the reviewing court must reverse if it cannot tell which of the two the jury chose. *Griffin* v. *United States*, 502 U. S. 46, 59 (1991), recognized an important distinction. In First Amendment cases such as *Stromberg*, one of the alternatives is "invalid" in a way that jurors cannot be expected to recognize, as being in violation of a constitutional right. In *Griffin*, on the other hand, one of the grounds was "invalid" in that it was unsupported by the evidence as to one of the defendants.

> "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When,

> therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence [citation]." *Ibid.*

The choice faced by the jurors in the present cases (if indeed they ever considered for a minute the far-fetched interpretation) is analogous, though not precisely the same. Once a capital case has passed the guilt and "eligibility" decisions, see *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994), the "bottom line" decision in the final "selection" step is a subjective decision as to the just result. While it may be phrased in facially objective terms such as whether aggravating circumstances outweigh mitigating, that weighing process turns on subjectively assigned weights so that it necessarily comes down to each juror's "gut level" assessment of the justice of the case.

If an instruction has two possible interpretations, will a jury engaged in the kind of deliberative process described by *Boyde*, *supra*, adopt the interpretation that forces jurors to sign their names to a bottom-line result they believe to be unjust, or will they adopt the one that allows them to render the verdict they believe to be right? In *Mills*, the Court accepted the petitioner's wild speculation that all 12 jurors might sign their names to a death verdict " 'even though eleven jurors think the death penalty wholly inappropriate.' " 486 U. S., at 374. The notion that jurors would do so when another interpretation is available to them borders on absurd. On a 12-member jury, even if a majority interpreted the instruction that way, surely some would not and would seek clarification from the judge.

The "reasonable likelihood" standard of *Boyde* should be bolstered with a presumption that jurors will lean toward an interpretation that allows them to reach the verdict they believe to be just whenever such an interpretation is available.[5] The idea that jurors would ignore mitigating circumstances that they believed to be proved by a preponderance of the evidence *and* that they believed warranted a sentence less than death and would then sign their names to a verdict they believed to be unjust would require a nearly ironclad, inescapable instruction to support it. In this case, there is nothing more than the absence of an instruction refuting a speculative inference that they might have thought the burdens of proof were symmetrical. See *State* v. *Gleason*, 299 Kan., at 1211, 329 P. 3d, at 1155 ("rank speculation"). Nothing in the Constitution of the United States requires reversing a verdict on such flimsy reasoning.

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5. *Mills* was wrongly decided on its facts. *Boyde* has already disapproved the standard used in *Mills*. Chief Justice Rehnquist's dissent in *Mills* explains that applying a reasonableness standard produces the opposite result. See 486 U. S., at 395. *Mills* should be expressly overruled before it causes any more damage. See *State* v. *Gleason*, 299 Kan., at 1195-1197, 329 P. 3d, at 1146-1148 (relying on *Mills*).

## CONCLUSION

The decisions of the Kansas Supreme Court in all three cases should be reversed.

June, 2015

Respectfully submitted,

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